Supreme Court, U.S.
FILED
JAN 7 1983
ALEXANDER L. STEVAS
CLERK

No. 82-623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TREASURE ISLE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Petitioner, TREASURE ISLE, INC.,[1] pursuant to Rule 22.5 of this Court, respectfully files this brief in reply to the Brief for the United States in Opposition filed in this case on December 27, 1982.

In its brief, the Government does not deny that the Eleventh Circuit's decision below, construing 18 U.S.C. § 1962(c) to permit the same entity to be both the RICO

[1]As required by Rule 28.1 of this Court, Treasure Isle, Inc. states that its corporate relationships as stated in its Petition for a Writ of Certiorari are currently accurate.

defendant and the RICO "enterprise," directly conflicts with *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982) (Brief in Opp., at 9 n.10). The decision below also conflicts with *Bennett* v. *Berg*, 685 F.2d 1053, 1061-62 (8th Cir. 1982). Although the Government attempts in its brief to create an artificial distinction because *Bennett* involved a civil RICO claim, the issue as to the proper scope of Section 1962(c) involved in *Bennett* and this case is identical.

The Government has presented no sound legal reason why this Court should not exercise its discretion and grant certiorari to resolve the conflict between the Eleventh Circuit and the other federal appellate courts cited above. Contrary to the Government's assertion, the question presented for review here is of continuing vitality and practical importance. First, despite respondent's unofficial, self-serving statement that it is not now Department of Justice policy to approve indictments "cast in the form employed in the present case except in extraordinary circumstances" (Brief in Opp., at 8-9), the expansion of Section 1962(c) beyond its statutory bounds by charging the same entity as the RICO defendant and RICO "enterprise" is quite capable of repetition in future cases.[2] *Cf. United States* v. *New York Telephone Co.*, 432 U.S. 159, 165 n.6 (1977) (certiorari granted to review completed pen register surveillance because controversy capable of repetition). In any event, the Eleventh Circuit's decision will have a substantial impact on *civil* RICO cases involving private litigants.

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[2]The permanence of the Government's claimed policy shift is doubtful. *See*, Criminal Division, U.S. Department of Justice, *An Explanation of the Racketeer Influenced and Corrupt Organizations Statute*, 2, 34-41 (4th ed. 1978) (describing RICO as providing tools for "imaginative prosecutions" and urging broad reading of the term "enterprise").

Second, it is not settled that the issue presented here can be avoided if the Government alleges that the "enterprise" is an "association in fact" comprised of individuals and a corporation as the Government maintains (Brief in Opp., at 8).[3] Section 1961(4) defines "enterprise" to include a "group of *individuals* associated in fact although not a legal entity" (emphasis added). Section 1961(3) defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property." It is clear from this definition that "individual" is used in the RICO Act to connote a living being so that a corporation cannot be a member of the "association in fact" making up an "enterprise." *Compare, United States* v. *Computer Sciences Corp.*, 511 F.Supp. 1125, 1131 (E.D. Va. 1981) ("enterprise" cannot be "association in fact" of individuals and corporation), *aff'd in part,* 689 F.2d 1181 (4th Cir. 1982), *cert. pet. on other grounds pending,* No. 82-728; *with United States* v. *Thevis,* 474 F.Supp. 134, 137 (N.D. Ga. 1979) ("enterprise" can be "group of individuals associated in fact with various corporations"), *aff'd,* 665 F.2d 616, 625 (5th Cir. 1982), *cert. denied,* ____ U.S.____, 102 S.Ct. 2300, 73 L.Ed.2d 1303 (1982).[4]

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[3]An identical argument was presented by the Government and rejected by the Fourth Circuit in *United States* v. *Computer Sciences Corp. See,* Petition for Rehearing at 9-10, *United States* v. *Computer Sciences Corp., supra.*

[4]In *United States* v. *Turkette,* 452 U.S. 576, 580 (1981), this Court said in dictum: "There is no restriction upon the associations embraced by the definition [of "enterprise"]: an enterprise includes any *** group of *individuals* associated in fact" (emphasis added). The other cases cited by the Government (Br. in Opp., at 8) only approved indictments charging the "enterprise" to be a group of living beings associated in fact.

Finally, this Court must not be deterred from reviewing the propriety of petitioner's RICO *conviction* because the Government now chooses to subjectively characterize the *sentence* as "not onerous" (Brief in Opp., at 9). This Court recognized long ago that criminal convictions have consequences beyond the immediate punishment.[3] *United States* v. *Morgan*, 346 U.S. 502, 512 (1954) (review of conviction available although sentence already served); *Fishwick* v. *United States*, 329 U.S. 211, 222 (1946) (certiorari granted although sentence completed because of collateral consequences of conviction). The term "racketeering" in Count 33 of the indictment prejudiced Treasure Isle in the eyes of the judge and jury and denied it a fair trial on the remaining counts. *United States* v. *Guiliano*, 644 F.2d 85, 89 (2d Cir. 1981); *United States* v. *Anderson*, 626 F.2d 1358, 1361 n.2 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). Furthermore, the RICO conviction has a continuing negative economic effect upon Treasure Isle by damaging its reputation in the business, financial, and investment communities.

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[3]In its brief, the Government misrepresents the extent of Treasure Isle's sentence. It actually received a sentence of one-year of probation with a special condition that it provide assistance to a community training center (R.XCV 10-12; CII 2002). Should Treasure Isle violate its probation it would be subject to the maximum statutory punishment: a $25,000 fine.

In light of the continuing importance of the question presented, a writ of certiorari must issue to review the judgment and opinion of the Eleventh Circuit. Treasure Isle must not be denied its opportunity for review of its RICO conviction by this Court merely because Government policy effecting future criminal cases may have changed.

Respectfully submitted,

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Dated: January 7, 1983